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November 22, 2019

Via Electronic Filing

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: *Ex parte* notice in *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142.

Dear Ms. Dortch:

On November 21, 2019, representatives of the National Multifamily Housing Council ("NMHC") met with members of the staff of the Wireline Competition Bureau in connection with the docket identified above. The issues discussed at the meeting are described in the attached materials, copies of which were provided to the participants.

The Commission staff who attended were: Daniel Kahn, Pamela Arluk, Ramesh Nagarajan, Mason Shefa, and Jesse Goodwin.

The NMHC representatives at the meeting were: Kevin Donnelly, Vice President, Government Affairs at NMHC; Julianne Goodfellow, Senior Director, Government Affairs at NMHC, and the undersigned.

Very truly yours,

HUBACHER AMES & TAYLOR, P.L.L.C.

Matthew C. Ames



# **THE REAL ESTATE ASSOCIATIONS OPPOSE FURTHER FCC REGULATION OF AGREEMENTS BETWEEN PROPERTY OWNERS AND BROADBAND PROVIDERS AS UNNECESSARY, UNWISE, AND UNLAWFUL**

- 1. The real estate industry is highly complex and diverse, and the issues raised in this proceeding are not readily addressed by one-size-fits-all regulation.**
  - Residential, commercial, and retail property owners all have different types of relationships with their residents and tenants, who in turn have different types of relationships with communications providers. By failing to acknowledge this, many commenters conflate issues, create confusion about the nature and scope of alleged problems, and misstate the source and extent of the Commission’s authority.
  - Key industry facts:
    - There are roughly half a million apartment buildings (5 units or more) in the United States, comprising about 20.8 million apartment units, and over 66,000 owners of apartment properties.<sup>1</sup> One third of apartment properties of five units or more are owned by individual investors, rather than by corporate entities or other types of business organization.<sup>2</sup>
    - There are roughly one million office buildings and over 5 million commercial buildings of all types in the country.<sup>3</sup>
  - Understanding the diversity of the real estate industry is important because:
    - Anecdotal evidence in the docket is highly unreliable -- a handful of examples are unrepresentative of a market this large and diverse.
    - There are plenty of opportunities in the market for new entrants to serve: commenters have submitted no evidence that they have approached and been rejected at a significant number of properties, either in absolute terms or when compared to the actual national totals.
    - The effective burden of any Commission regulation would fall on the larger companies that already aggressively and effectively pursue multiple competitive options; this would only discourage further deployment. Regulation would have less effect on smaller owners and properties because they typically find it harder to attract competitors in the first place.

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<sup>1</sup> NMHC Quick Facts: Ownership and Management (July 2017), available at <https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-ownership-and-management/>

<sup>2</sup> *Id.*

<sup>3</sup> Comments of the Real Estate Associations (“REA Comments”) at 14.

**2. The real estate industry actively promotes and pays for deployment of broadband infrastructure; the proposed regulations will discourage further investment, hinder deployment, and further increase the cost of housing.**

- Typical costs of developing a suburban apartment community can range from \$35,000,000 to \$68,000,000; such costs can run well into the hundreds of millions in dense urban markets.<sup>4</sup>
- In new construction, property owners typically pay 85-90% of inside wiring costs, ranging from \$500 - \$1200 per apartment unit.<sup>5</sup> In existing buildings, wiring upgrade costs of \$100 – \$150 per unit are also borne by the owner.<sup>6</sup> This is a form of subsidy to providers.
- Apartment owners typically bear the cost of all electricity consumed by provider electronics in a building;<sup>7</sup> while seemingly small on an individual unit basis, it still adds significantly to the owner’s underlying long-term operating costs. Furthermore, in the past, when copper telephone wiring and coaxial cabling carried all of the necessary electricity, these costs (then much smaller) were borne by the providers.<sup>8</sup>
- Aside from wiring and electrical power costs, owners typically bear the following kinds of expenses: (i) engineering system and design review (in new construction and for system upgrades); (ii) space in the main distribution frame for installation of provider electronics; (iii) space in the intermediate distributions frame (at each floor) for provider electronics; (iv) installation of distribution panels in each unit (in new construction) or electric receptacles inside distribution panels in each unit (for upgrades); (v) outside trenching to allow installation of conduit to the building; (vi) conduit and wiring inside the building (both wiring and labor costs); and (vii) labor costs for all of the above, plus oversight of provider contractor work.<sup>9</sup>
- The residential real estate industry alone has invested at least \$500,000,000 in DAS construction alone, and this number will only go up.<sup>10</sup>
- Because development is costly and time-consuming, new mandates that impose costs on owners – whether they be financial costs such as reductions in revenue or increases in expenditures, or transactional costs – will only hinder broadband deployment. For example, restricting the ability of owners to obtain compensation for infrastructure they own will simply induce owners to cut back on such investment and require providers to bear the cost themselves.

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<sup>4</sup> REA Comments at 7.

<sup>5</sup> REA Comments at 15.

<sup>6</sup> REA Comments at 15.

<sup>7</sup> Exhibit A to REA Reply Comments, Declaration of Avalon Bay Communities, Inc. (“AVB Decl.”), at 7.

<sup>8</sup> *Id.*

<sup>9</sup> AVB Decl. at 7-9; Exhibit E to REA Comments, Declaration of Art Hubacher (“Hubacher Decl.”), at Appendix C.

<sup>10</sup> REA Comments at 17.

**3. The record shows that broadband competition in multiple tenant environments is the rule, not the exception.**

- The Real Estate Associations comments show that there are at least two broadband providers in roughly 76% of apartment communities, including 80-90% of new construction.<sup>11</sup> This level of competition exists along with agreements for exclusive use of wiring, exclusive marketing, non-exclusive marketing, and payment of some form of compensation, in all cases, by both LECs and cable MSOs.<sup>12</sup> Currently, only 44% of Americans have access to two wireline broadband providers.<sup>13</sup>
- No commenter has asserted that access to commercial office buildings is a significant issue. Commercial tenants routinely have multiple options and often are permitted to bring in the provider of their choice.
- Only CenturyLink has raised any concerns regarding access to shopping center tenants. Large shopping centers present unique challenges for property management, but tenants still have access to competitive providers.

**4. The Commission has no general authority to regulate competition or to restrict anti-competitive behavior and the limited authority it does have does not apply in this case.**

- Proponents of regulation seem to assume that merely claiming that a particular practice hindered them from providing service at a particular location justifies Commission action. This is unreasonable.
- We urge the Commission to ask four questions in evaluating such claims:
  - Does the Commission have the authority to regulate the particular practice under a statute granting the authority to take a particular action?
  - Could the supposedly objectionable practice in principle have the alleged anticompetitive effect?
  - Does the practice occur with sufficient frequency actually to have a significant anticompetitive effect?
  - Would the proposed remedy actually address the alleged problem?
- In this case, despite the size of the potential market, proponents offer only a handful of anecdotes. Much of their claimed evidence amounts to no more than supposition.
- The Real Estate Associations, on the other hand, have offered survey evidence showing that (i) two-provider competition is the norm; (ii) three-provider competition is common; and (iii) a single provider is rare.<sup>14</sup> This is true even though the Commission's own rules anticipate that property owners may choose to grant access to only a single provider.
- There is no statutory authority for the idea that every provider is entitled to access to every building. The Commission has no power to require owners to accept more

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<sup>11</sup> REA Comments at 65-66.

<sup>12</sup> REA Comments at 67; Hubacher Decl. at 3-4, 8-9.

<sup>13</sup> REA Comments at 22, 66.

<sup>14</sup> REA Comments at 66.

than one provider, even if that were necessary. In fact, only a third of the states have adopted mandatory access legislation, and most of those that have only granted such rights to certain types of provider. In reality, the market is working.

- Furthermore, there is no statutory authority for regulating the types of contracts under consideration:
  - The *Internet Freedom Order* precludes the extension of Title II provisions to broadband services or facilities.<sup>15</sup>
  - The *Internet Freedom Order's* carve-out for Section 224 carve-out is of no help, because the issues in this proceeding do not concern access to poles or conduit. Furthermore, in *Mozilla Corp. v. FCC*, No. 18-1051 (D.C. Cir., Oct. 1, 2019), the court held that “Section 224 no longer speaks to broadband” at least in the case of providers of standalone broadband. *Id.*, slip op. at 106-108.
  - Section 628 does not apply because the exclusivity provisions at issue are not deceptive or anticompetitive: in fact, the record shows that apartment residents are more likely to have access to a competitive broadband provider than single family residents (76% vs 44%, as cited above).
- New entrants claim that current practices interfere with their ability to compete even though the record shows that other entities are competing successfully. Regulating under these circumstances amounts to moving the goal posts: over many years, property owners and providers have worked out mutually acceptable mechanisms for deploying competitive broadband services, but a handful of new entrants with no real track record in the industry are now asking the Commission to interfere with those mechanisms. This is both illogical and unfair.
- Finally, the only statutory definition of effective competition calls for deregulation of cable television rates once there are two providers in a market. The current market mechanisms addressed in this proceeding have largely achieved the two-provider standard for broadband service in apartments: further regulation is not needed.

**5. The Commission cannot adopt fair and comprehensive rules governing inside wiring in residential properties without requiring the local exchange carriers to share their facilities.**

- No commenter has effectively addressed the following key points:
  - 47 C.F.R. § 804(a) expressly permits building-by-building competition; unit-by-unit competition under 47 C.F.R. § 804(b) is merely an option.
  - The Commission’s *Sheetrock Order* removed all incentive for cable MSOs to own wiring inside buildings.
  - The Commission’s LEC fiber orders appear to allow LECs to retain control of fiber facilities all the way to the unit premises, without sharing any of their facilities.

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<sup>15</sup> See discussion in REA Comments at 45-46, REA Reply Comments at 6-7.

- In any case, the Commission and the industry have already tried wire sharing; it doesn't work, which is why the incumbents have not relied on it.<sup>16</sup>
- In light of these facts, none of the claims regarding alleged circumvention of the Commission's rules or the alleged impropriety of so-called "sale-and-leaseback" agreements have any merit.

**6. Adopting the specific proposed regulations would be counterproductive, because none would actually encourage deployment and existing mechanisms have already succeeded in extending competition.**

- Banning or limiting door fees, true revenue sharing, or other compensation paid to owners will discourage residential owners from investing in infrastructure and will simply shift costs onto providers. In most cases, owners will simply choose between allowing entry by a new competitor at the competitor's expense, and, if the competitor refuses to bear the cost, or installing new facilities to each unit is deemed too disruptive, simply accepting the existing level of competition. It is important to remember that most existing buildings are already served by two providers. Some owners may install "open access" networks at their own expense and allow any provider to use them, but the cost of deployment and maintenance will discourage this, especially because the large national incumbents still typically prefer to own or control the facilities they use.
- Banning exclusive use of wiring agreements would not give owners any incentive to grant access to additional providers. Owners could still enter into agreements granting non-exclusive use of wiring and simply not grant access to any other provider that might want to try to use the wiring. Banning such agreements would complicate the negotiation of agreements with the incumbent MSO in ways we cannot now predict, but it would do nothing to encourage grants of access to other types of providers.
- Regulating exclusive marketing also would not give owners any incentive to grant access to additional providers. The Commission cannot require owners to give all providers the same marketing rights, so while incumbents might lose certain benefits, this is of no value to a competitor if the owner does not give a competitor access in the first place. Furthermore, nonexclusive marketing agreements are already commonplace, but owners will have no incentive to enter into them if cash compensation is banned.
- Commenters generally agree that transparency requirements would be ineffective.
- Regulating DAS agreements would hinder deployment and harm consumers.
- There is no evidence that exclusive rooftop leases exist in any significant number.

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<sup>16</sup> See discussion in AVB Decl. at 5-7.

# Demand for apartments is outpacing supply.

Creating more apartment homes is the answer to America's housing shortage.

## What's making renting apartments more popular?

**75 MILLION**

adults 18-34 entering the rental market

**60% INCREASE**

in adults 45+ renting in the last decade

**ONLY 20%**

of U.S. households are married couples with kids, reducing demand for traditional homes

**25%**

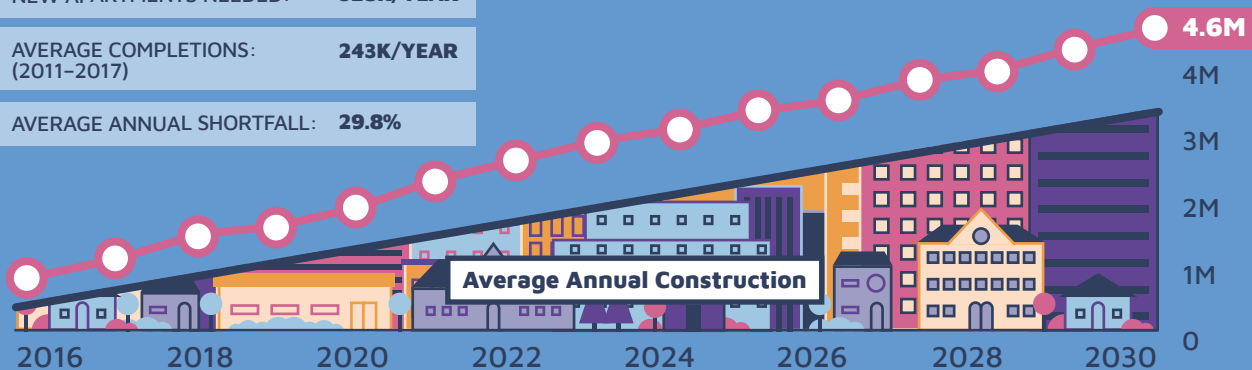
as the U.S. population becomes more diverse, 25% of apartment householders were born outside of the U.S.

## America needs 4.6 million more apartments by 2030.

NEW APARTMENTS NEEDED: **328K/YEAR**

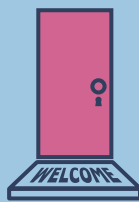
AVERAGE COMPLETIONS: (2011-2017) **243K/YEAR**

AVERAGE ANNUAL SHORTFALL: **29.8%**



## Building more apartments creates jobs and stimulates the economy

**\$1.3 TRILLION**  
to the economy



**39 MILLION**

Americans call apartments home



**12.3 MILLION JOBS**

We need collaboration between policymakers and the apartment industry to alleviate the housing shortage and help millions of people find home.

Learn more at:  
**WeAreApartments.org**

**NMHC**

NATIONAL  
MULTIFAMILY  
HOUSING  
COUNCIL

**NAA**  
NATIONAL APARTMENT ASSOCIATION



# National

Apartments and their residents contribute **\$3.4T** to the national economy annually, supporting **17.5M** jobs.

## 38.7M

### Apartment Residents

Spending from the country's apartment residents contributes **\$3.0T** to the local economy each year (including **\$350.8B** in taxes), creating **16M** jobs.

## 20.7M

### Apartment Homes

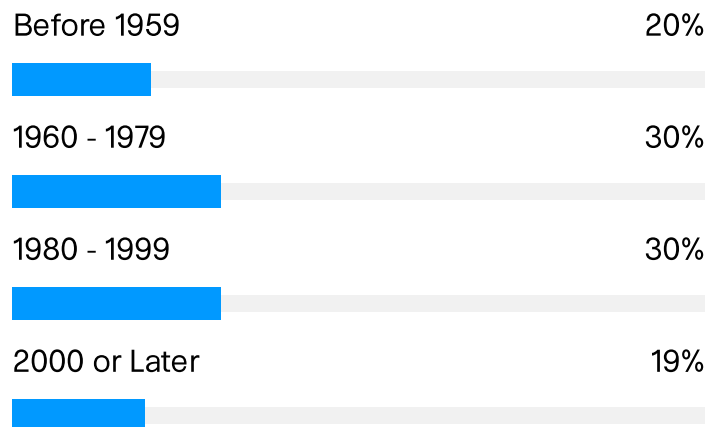
The operation of the country's apartment homes contributes **\$175.2B** to the local economy each year (including **\$58.0B** in property taxes), creating **341K** jobs.

## 50%

### Share of U.S. Apartments Built Before 1980

The renovation and repair of apartments helps preserve the country's older more affordable units, contributing **\$69B** to the local economy annually and creating **340K** jobs.

### Age of Stock



## 328K

### New Apartments Needed Annually

Apartment demand is growing and the industry needs to keep up. However, producing enough new apartments to meet demand requires new development approaches, more incentives and fewer restrictions.

The country needs to build **328K** new apartment homes each year to meet demand. Apartment construction contributes **\$150.1B** to the country's economy annually, creating **752K** jobs.



Source: Hoyt Advisory Services; NMHC/NAA; U.S. Census Bureau